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LAI SOON ONN v. TAN TIAN SIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN JC
[SUIT NO: WA-22NCC-224-06-2016]
23 JANUARY 2017

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CIVIL PROCEDURE: *Striking out – Statement of claim – Plaintiff initiated action against defendants for contravening s. 218(2) of Capital Markets and Services Act 2007 and s. 9(1) of Malaysian Code on Take-over and Mergers 2010 – Orders for declaratory reliefs, damages and to compel defendants to make mandatory general offer – Sections 357(1) and 360 of Capital Markets and Services Act 2007 – Application to strike out statement of claim – Whether plaintiff had reasonable cause of action against defendants – Whether plaintiff had locus standi to seek declaratory orders – Failure of plaintiff to obtain ruling from Securities Commission prior to commencement of suit – Whether plaintiff entitled to damages – Whether plaintiff's action ought to be struck out*

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SECURITIES: *General mandatory offer – Control of more than 33% of shares in company – Failure by defendants to make mandatory general offer – Claim for declaratory reliefs by plaintiffs under s. 357 and s. 360 of Capital Markets and Services Act 2007 – Whether plaintiff entitled to reliefs sought – Whether plaintiff satisfied conditions under s. 41 of Specific Relief Act 1950 – Whether compliance with Malaysian Code on Take-over and Mergers a relevant requirement – Whether ruling by Securities Commission a condition precedent to action – Whether plaintiff's claim premature*

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The plaintiff essentially sought a declaration that the first to fourth defendants were acting in concert in taking over control of the fifth defendant, a company listed on the Main Market in the Bursa Malaysia Securities Berhad and having an issued and paid-up capital of 239,837,685 by holding 33.74% of the shares in the fifth defendant without making a mandatory general offer ('MGO'). The plaintiff contended that the first to fourth defendants had contravened s. 218(2) of the Capital Markets and Services Act 2007 ('CMSA') and s. 9(1) of the Malaysian Code on Take-over and Mergers 2010 ('the Code') and as such, they be ordered, *inter alia*, declaratory reliefs, to pay damages to the plaintiff for the losses suffered as a result of the breach; and an order to compel the first to fourth defendants to undertake a MGO. In seeking the reliefs the plaintiff relied on ss. 357(1) and 360 of the CMSA. The third defendant subsequently applied to strike out the plaintiff's statement of claim ('SOC') pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012 ('ROC') *vide* encl. 9 on the basis that the claim disclosed no reasonable cause of action. The third defendant's argument was that (i) the plaintiff in seeking the declaratory reliefs, must have a right and the *locus standi* pursuant to s. 41 of the Specific Relief Act 1950 ('SRA'); (ii) the plaintiff was asking for the declaratory reliefs which he was not entitled to under ss. 357(1) and 360 of the CMSA; (iii) the plaintiff was not entitled to damages that he sought

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as he had not obtained a ruling from the Securities Commission ('SC') prior to the commencement of this suit and as such he did not have a cause of action to claim damages; (iv) the plaintiff's claim for damages and the reliance upon s. 357 of the CMSA was pre-matured and must necessarily fail; (v) the plaintiff's failure to sue the joint tortfeasors tantamount to a release/discharge of this suit against the defendants; and (vi) the plaintiff was not entitled to compel the defendants to undertake the MGO as the court's discretion to make such order will only arise if the application was made by a person aggrieved by an alleged contravention by another person of a relevant requirement under s. 360 of the CMSA. The third defendant further argued that the compliance with the Malaysian Code on Take-overs and Mergers 2010 ('Code') was not a relevant requirement under the CMSA as the CMSA expressly states that it was the SC's duty to administer the Code.

Held (allowing encl. 9 with costs):

(1) The reliefs sought by the plaintiff were wide wherein the plaintiff asked for a declaration that the defendants had breached a penal provision and for an almost permanent injunction *ie*, to compel the defendants to make the MGO. To entitle the plaintiff to the reliefs sought, he must have an existing right and the court may, in its discretion, grant the declaratory reliefs pursuant to s. 41 of the SRA. The plaintiff had failed to fulfil the requisite criteria to ask for the declaratory reliefs and he had no *locus standi* and was asking for reliefs which he was not entitled to under the law. Declaratory orders cannot be granted when the strict requirement set out in the section is not satisfied. (paras 26, 27 & 29)

(2) The plaintiff's submission was inconsistent with the reliefs he sought in the SOC. The tort of unlawful conspiracy does not give the power to the court to give a declaratory order that the defendants contravened a penal provision of the CMSA. This court could not entertain a declaratory relief which has no nexus to the pleadings of unlawful conspiracy. The declaratory reliefs sought by the plaintiff were for the breach of statutory duties and in the absence of the power under the CMSA to grant those reliefs, this court was powerless to grant the reliefs. Further, the plaintiff could not escape the fact that he did not have the right to the declaratory. (para 44)

(3) Since s. 153 of the Securities Commission Act 1993 ('SCA') is in *pari materia* with s. 357 of the CMSA, the same interpretation must be given to the latter. In both s. 153 of the SCA and s. 357 of the CMSA, it is not expressly provided that the ruling of the SC is a condition precedent to an action. In view thereof, as the SC had not made any ruling in this instant matter, the plaintiff could not be allowed to come to court to pursue the declaratory reliefs and there was no right to damages under s. 357 of the CMSA before such ruling of the SC is made. As the plaintiff had not obtained a ruling from the SC prior to the

commencement of this suit, he did not have a cause of action to ask for damages. As such, the plaintiff's claim for damages in reliance of s. 357 of the CMSA was pre-matured. (paras 47, 50 & 68)

(4) Section 360 of the CMSA is a general 'catch-all' provision and in totality gives the court wide powers. However, s. 360 of the CMSA does not confer upon the court with the power to grant declaratory reliefs. The declaratory reliefs the plaintiff sought were from the allegation of breach of statutory rights but unfortunately, the provisions in the statute relied upon by the plaintiff did not give him that right. There is a clear distinction between ss. 357 and 360 of the CMSA. Section 357 of the CMSA relates to pecuniary losses whilst s. 360 of the same confers the court with a discretion to make variety of orders. In scrutinising s. 360 of the CMSA, the court's discretion is only exercisable when the application is made by person aggrieved by an alleged contravention by another person of a relevant requirement. Therefore, pursuant to s. 360, one becomes an aggrieved person only when there is contravention of a 'relevant requirement'. It is a technical definition of an aggrieved person, not a dictionary meaning. Further, the words 'relevant requirement' should not be interpreted according to the dictionary meaning as this will tantamount to a mischief which will harm the language of the statute. (paras 69-72, 75 & 76)

(5) The wording of s. 360 of the CMSA is also exhaustive and the Parliament cannot be said to have intended for the definition of 'relevant requirement' to be open-ended. Otherwise, the Parliament would have employed the expression 'include' into the definition of 'relevant requirement'. The word used in s. 360(13)(c) of the CMSA is 'means'. When the word 'means' is employed to define 'relevant requirement', the rebuttable presumption of the statutory interpretation is that the Parliament intended to restrict the meaning of the expression defined. The requirements found in the sections can be ascertained *via* an objective test and the court may exercise its discretion judiciously to make any orders under s. 360 of the CMSA. (paras 77 & 79)

(6) Compliance with the Code is not a relevant requirement under the CMSA. Section 217(3) of the CMSA provides that the Code shall contain principles governing take-over offer, merger or compulsory acquisition. The word 'requirement' does not appear in ss. 217 to 220 of the CMSA. The word 'requirement' is not found in ss. 217 to 220 of the CMSA, it must follow that s. 360 of the CMSA is not intended to confer on the plaintiff a right to apply to compel the defendants to undertake a MGO. (paras 80 & 81)

(7) This kind of action will open the flood gate to litigation. The gate must be opened only when there is a breach of a relevant requirement. Further, if s. 360 of the CMSA is intended to confer on this court with the discretion to compel the defendants to undertake a MGO, then this

court is stepping into the SC's shoes. The courts will not interfere nor step into the shoes of the regulator, it is superfluous for Parliament to enact s. 219 of the CMSA if the courts are entitled to take away that right accorded to the SC by virtue of s. 360 of the CMSA. As such, the third defendant's argument that there was no private right to compel the defendants to undertake a MGO was fortified. (para 85)

(8) The general rule that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all, if it is proven that there is a concerted action towards the common end. The court was unable to see how a charge of collusion or conspiracy in a suit could be initiated when not all tortfeasors were charged or sued in the same case. The position was such that when the plaintiff chose not to sue, he did that at his own peril. The plaintiff was not able to sustain the allegation of conspiracy as the entire substratum of his claim was affected by his failure to make the three individuals as co-defendants. (para 89)

(9) The plaintiff was not entitled to the declaratory reliefs as he was not entitled to them under ss. 357 and 360 of the CMSA and the reliefs sought were academic. The plaintiff was also not entitled to damages as s. 357 of the CMSA was only actionable after the ruling by the SC. The release of the joint tortfeasors meant the entire claim against the defendants was also not sustainable. (para 110)

Case(s) referred to:

Ahmad Saidi Md lsa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [2006] 1 CLJ 977 CA ***(refd)***

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Dato Abdullah Ahmad & Ors v. Bank Bumiputra Malaysia Bhd [2001] 1 LNS 352 HC ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Goh Joon v. Kerajaan Negeri Johor & Ors [1999] 5 CLJ 335 HC ***(refd)***

Hooman Khanloo v. PP [2015] 6 CLJ 1005 CA ***(refd)***

Ideris Ondet v. Syarikat Eastern Sawmill (Sarawak) Sdn Bhd [2002] 1 LNS 214 HC ***(refd)***

Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case [2012] 7 CLJ 407 HC ***(refd)***

Kuan Shin @ Kuan Nyong Hin & 3 Ors v. Ng Aik Kee & 6 Ors [2016] 1 AMCR 701 ***(refd)***

Mak Siew Wei v. Dato' Dr Norbik Bashah Idris & Ors [2016] 6 CLJ 64 HC ***(dist)***

Malbai v. Nawi [1961] 1 LNS 59 HC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

R v. Securities and Futures Authority ex p Panton (Unreported) ***(refd)***

Sabu Development Sdn Bhd v. Kelik Bayel [2007] 9 CLJ 475 HC ***(refd)***

Saw Seng Kee v. Nadzri & Ng Securities Sdn Bhd [1997[2 CLJ 425 CA ***(refd)***

Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor [2017] 4 CLJ 587 CA ***(foll)***

Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(dist)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(foll)***

A *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal [2012] 8 CLJ 678 CA* ***(dist)***
Tengku Jaffar Tengku Ahmad v. Karpal Singh [1993] 4 CLJ 183 HC ***(refd)***
Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***
Tumasek Beckmann Cutlery Sdn Bhd v. Bromma (M) Sdn Bhd [2008] 1 LNS 280 HC ***(dist)***
B *Yung Ing Ing v. Hunfara Construction Sdn Bhd [2015] 7 CLJ 438 CA* ***(foll)***

Legislation referred to:
Capital Markets and Services Act 2007, ss. 11, 216, 217(3), (4), 218(2), 219, 220, 221, 222, 223, 224, 225, 357(1), 360(1)(a), (c), (13)(c)
Interpretation Acts 1948 and 1967, s. 17A
C Rules of Court 2012, O. 18 r. 19(1)(a)
Rules of High Court 1980, O. 15 r. 16, O. 18 r. 19(1)(b), (c), (d)
Securities Commission Malaysia Act 1993, ss. 33, 33A(4), (5), 33B, 33C, 33D(1)(a), (b), (c), (d), (e), (f), (g), (2), (3), 33E, 34, 34A, 34B, 34C, 153
Securities Industry Act 1983, s. 100
Specific Relief Act 1950, s. 41
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Other source(s) referred to:
Law of Torts, 10th edn, p 263

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E *For the 2nd defendant - Caryn Shua & YW Tan; M/s Richard Tee & Chin*
For the 4th defendant - WL Lum; M/s David Lai & Tan

Reported by Sandra Gabriel

F **JUDGMENT**

Noorin Badaruddin JC:

[1] This is the third defendant's application to strike out the plaintiff's statement of claim pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012 ('ROC') (encl. 9) on the basis that the claim discloses no reasonable cause of
G action.

[2] The plaintiff is a former employee and a shareholder of 3,600 shares of the fifth defendant.

[3] The first defendant is a director and a shareholder whilst the second
H to the fourth defendants are shareholders of the fifth defendant.

[4] The fifth defendant, formerly known as CBSA Berhad is listed on the Main Market in the Bursa Malaysia Securities Berhad and having an issued and paid-up capital of 239,837,685 shares as at 27 March 2012.

I **Plaintiff's Writ Action**

[5] The plaintiff essentially seeks a declaration that the first to fourth defendants, as an acquirer (which includes plural) were acting in concert to obtain control of the fifth defendant company and that they had contravened

s. 218(2) of the Capital Markets and Services Act 2007 ("CMSA") and s. 9(1) of the Malaysian Code on Take-overs and Mergers 2010 ("the Code") for their failure to undertake a mandatory offer for the shares in the fifth defendant company, and that as such they be ordered (*inter alia*) to pay damages to the plaintiff for the losses suffered as a result of the breach.

[6] The plaintiff claims that the first to fourth defendants have acted in concert in taking over control of the fifth defendant by holding 33.74% of the shares in the fifth defendant without making a mandatory general offer ("MGO").

[7] In seeking for the reliefs, the plaintiff relied on ss. 357(1) and 360 of the CMSA. The plaintiff also relied on the decision by the learned Judicial Commissioner, Mohd Nazlan Mohd Ghazali in *Mak Siew Wei v. Dato' Dr Norbik Bashah Idris & Ors* [2016] 6 CLJ 64; [2016] 1 AMCR 733, ("*Mak Siew Wei*") in justifying that this suit ought to be sustained and be disposed of at trial.

Third Defendant's Contention

[8] It is the third defendant's argument that the plaintiff in seeking a declaratory relief must have a right and the *locus standi* pursuant to s. 41 of the Specific Relief Act 1950 ("SRA"). It is contended that the plaintiff is asking for the declaratory reliefs which he is not entitled under the law as the statutory provisions of the CMSA ie, ss. 357(1) and 360 which are pleaded in the statement of claim ("SOC") do not entitle him to the declaratory reliefs sought.

[9] The third defendant contends further that the declaratory reliefs sought by the plaintiff is academic in nature because even if they are granted, the plaintiff cannot enforce them by way of a criminal prosecution as the declaratory reliefs sought are worded in such a manner as to declare that the defendants committed a criminal offence under the CMSA.

[10] It is the third defendant's case that the plaintiff is not entitled to damages that he seeks for as he has not obtained a ruling from the Securities Commission ("SC") prior to the commencement of this suit and as such he does not have a cause of action to ask for damages. According to the third defendant, the plaintiff's claim for damages and the reliance upon s. 357 of the CMSA is premature and must necessarily fail.

[11] The third defendant argues further that the plaintiff's failure to sue the joint tortfeasors tantamount to a release/discharge of this suit against the defendants. As the plaintiff has pleaded that there is a concerted effort towards the common end in his SOC, he is not able to sustain the allegation of conspiracy as the entire substratum of his claim is affected by his failure to make three other individuals as co-defendants.

[12] The third defendant submitted that the plaintiff is not entitled to compel the defendants to undertake the MGO as the court's discretion to make such order will only arise if the application is made by a person aggrieved by an alleged contravention by another person of a relevant requirement under s. 360 of the CMSA. The third defendant argues that the compliance with the Code is not a relevant requirement under the CMSA as the CMSA expressly states that it is the SC's duty to administer the Code.

[13] The third defendant further states that the decision of the learned JC in *Mak Siew Wei*'s case (*supra*) is *per incuriam* as the learned JC did not consider that the plaintiff in that case was not entitled to the declarations as ss. 357 and 360 cater to different eventualities.

The Plaintiff's Argument

[14] It is the plaintiff's pleaded case that:

(i) there is an agreement/arrangement between the first to fourth defendants to obtain control of the fifth defendant without undertaking the MGO as prescribed by the CMSA and the Code;

(ii) the effect/purpose of the agreement/arrangement is to deprive the plaintiff from receiving an offer from the first to fourth defendants; and

(iii) as a result, the plaintiff had suffered losses as pleaded in para. 18 of the SOC

[15] Hence, the plaintiff argued that he has a cause of action against the first to fourth defendants under tort of unlawful means of conspiracy, which is actionable. According to the plaintiff, he had also pleaded that the first to fourth defendants are "joint tortfeasors" in para. 17 of the SOC.

[16] Independent from the tort action, the plaintiff argued that he is also entitled to commence this writ action as conferred by s. 357 and/or s. 360 of the CMSA. The court's attention is brought to the *Mak Siew Wei*'s case which according to the plaintiff is where the High Court has the first opportunity to consider the private cause of action conferred to a plaintiff by ss. 357 and 360 of the CMSA in respect of breach under s. 218 of the same.

[17] According to the plaintiff, the learned JC in *Mak Siew Wei* (*supra*) had subjected the whole CMSA to the maximum evaluation where he ruled, *inter alia*, as follows:

> [12] Whilst being in full cognisant of the fact that this instant case revolves around the issue of *locus standi* which is undeniably similar to the one earlier decided by the Court of Appeal in *Shahidan Shafie*, and equally mindful of the doctrine of *stare decisis* and the resulting binding nature of the decision of the Court of Appeal on this court, I have arrived at a decision that appears to be inconsistent with the outcome of *Shahidan Shafie*. This is entirely however the result of the interpretive process that in my view justifies my distinguishing *Shahidan Shafie* in the manner that I shall next attempt to demonstrate, in the rest of this judgment;

[19] Thirdly, s. 357, which is the focus of the instant case, gives the statutory right to a person who suffers loss by reason of a breach of any provision of Part VI (which, for the avoidance of doubt, includes the requirement to undertake a mandatory general offer under s. 218) to institute civil proceedings in order to recover from the person in default...; A

[21] Fifthly, both the SC and any person aggrieved by the relevant transgression (as well as the exchange holding company or the stock exchange), may also, separately, seek the assistance of the court, under s. 360(1)(a) and (d) respectively, since a contravention of the requirement to undertake a mandatory general offer permits the court to make various orders stated in paras. (A) to (0) of s. 360(1) ...; B

[22] These enforcement mechanisms can be initiated and pursued by either the SC (ie, ss. 218, 220, 358 and 360) or the persons aggrieved by the breach (ss. 357 and 360). These other provisions were not considered in *Shahidan Shafie*. It is, in my view, thus quite plain and obvious that a person who claims to be aggrieved by a breach of s. 218 (on the failure by the person in breach extending a mandatory general offer) can resort to ss. 357 and 360 of the CMSA to vindicate his rights. I am further of the view that the words of these two statutory provisions are clear and if literally read, which should indeed be the case given the trite rule of statutory construction, provide for the claimant to institute a civil suit to enforce his right for recovery under s. 357 and pray for other specified reliefs under s. 360 accordingly. And crucially for present purposes, this can be done without the involvement of the SC because first, it is not mentioned in these sections or any other parts of the CMSA that any form of determination by the SC such as in the nature of a ruling is a prerequisite and secondly, ss. 358 and 360(1)(a) and (b) separately confer on the SC precisely substantially the same statutory right to pursue civil proceedings against the person in default, as those embodied in ss. 357 and 360(1)(d) *vis-a-vis* any person aggrieved by the breach. C D E F

[23] The imperative of applying the construction that promotes the literal and plain meaning of statutes cannot be emphasised enough. This is always the first rule of interpretation that ought to be followed, even in the face of the provision of s. 17A of the Interpretation Acts 1948 and 1967. This proposition of law was lucidly clarified by the Federal Court in the case of *Andrew Lee Slew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24. G

[24] On the premise of the aforesaid rule of interpretative process, it is in my view only natural, and thus compelling, for a plain meaning of the provisions as they manifestly appear in ss. 357 and 360(1)(d) of the CMSA be construed to be the correct reading of the same. This would retain the clear differences created by the CMSA in making available the availability of various enforcement options. H

[54] In the context of the CMSA, there is in my view, no conceptual difficulty with the notion that an investor who suffers loss as a result of a breach of the mandatory general offer obligation pursues a civil recovery action against the person in breach without a prior ruling from the SC determining whether there is a breach in the first place. I

[18] As illustrated above, the plaintiff submitted that the learned JC had undertaken a literal approach in interpreting the relevant provisions of the CMSA. According to the plaintiff, this is the prevailing approach when the words are clear and unambiguous as in this case.

[19] The plaintiff further argued that even assuming one were to take a purposive approach, it will still come to the same conclusion, as the Corporate Governance Blueprint 2011 issued by the SC makes the following pertinent observations about the state of play on enforcement of corporate governance related offences:

> Good corporate governance is shaped by the complementary and inter-dependent efforts of all stakeholders. The efforts of regulators in strengthening the legal and regulatory framework and ensuring effective supervision and enforcement are just one part of the overall measures required to strengthen corporate governance. Companies, shareholders and reputational intermediaries need to step up their efforts in exercising their respective responsibilities for ensuring good governance. In this context, self and market discipline must complement regulatory discipline to ensure integrity, confidence and fairness in the markets.
>
> Market discipline must disincentive poor corporate conduct through its assessment of corporate performance as reflected in stock prices, bond spreads and credit ratings. Companies must embrace the need for ethical practices, and directors must discharge their fiduciary duties by ensuring integrity, transparency and accountability. Above all, shareholders must empower themselves to be more assertive in demanding corporate accountability. Where there is failure in such obligation, action must be taken.
>
> Effective public and private enforcement reinforces self-discipline as the real threat of legal action compels companies to tighten their governance processes to ensure conduct consistent with the law.
>
> In this regard, Malaysian laws empower shareholders to seek civil remedies through private enforcement actions. However, it is generally observed that the passive nature of shareholders, paired with a habitual reliance on regulators to detect wrongdoing and initiate investigations, puts the burden of enforcement solely on governmental bodies.

[20] Lastly, the plaintiff emphasised that all other authorities concerning failure to undertake MGO had been considered, and distinguished by the learned JC in *Mak Siew Wei (supra)*, as below:

> [15] *Shahidan Shafie* concerned the application of the relevant take over provisions in the SCA which were in force then. The Court of Appeal was not presented with the opportunity to consider the context of the relevant provisions of the CMSA which had not yet been introduced to apply to the facts at the relevant time, and which Act has since consolidated the principal legislative provisions governing issue of securities and take overs previously found in the SCA, as well as the entirety of the Securities

Industry Act 1983 and the Futures Industry Act 1993, both of which have thus been repealed. Furthermore, and in any event, *Shahidan Shafie* did not have to examine the scope of s. 360 of the CMSA which however is relied on by the plaintiff in the instant suit, in addition to s. 357 of the same Act;

[33] Further, yet another aspect of the CMSA which did not have to be considered by *Shahidan Shafie* is that the essence of s. 357(1) conferring on those who suffer losses by reason of a contravention by another the private right to sue for recovery by way of civil proceedings is also similarly substantially contained in other provisions of the CMSA;

[37] In situations relevant to the enforcement of private right under ss. 199, 201(1) and 210, it is difficult to appreciate the practicality of the person who suffers loss having to first secure a determination by the SC that a relevant breach has indeed been committed, before the private suit may be allowed to progress. I again stress that none of these provisions, now firmly in the CMSA, was previously found in the SCA and their relevance did not therefore have to be considered by the Court of Appeal in *Shahidan Shafie*;

[38] Neither was s. 360 of the CMSA ever part of the SCA, although it was originally enacted in s. 100 of the Securities Industry Act 1983, and thus similarly did not have to be dealt with in *Shahidan Shafie*;

[47] It is crucial to observe that *Aun Huat* had to embark on the requisite analysis on whether the relevant statutory provisions could be construed as creating a private cause of action because of the patent absence, at the material time, of any legislative provisions in the SCA then which clearly provide for such a right. Similarly, *Tuan Hj Zulkifli* too did not consider s. 153. The High Court in *Extreme System* (which had referred to *Aun Huat*) did however have the opportunity to consider s. 153, even though the said s. 153 was similarly inapplicable to the facts in *Extreme System* as it was already by then repealed, with the view to its incorporation in the CMSA which had at that juncture not yet occurred (but already well in place at the time of *Shahidan Shafie*);

[66] In my view, this more than sufficiently discloses a reasonable cause of action in the claim filed by the plaintiff.

[21] In conclusion, the plaintiff submitted that it is trite that as long as the SOC discloses some cause of action or raises some questions fit to be tried, the mere fact that the case is weak or is unlikely to succeed is irrelevant and premised on the above, the third defendant's application ought to be dismissed for devoid of merits.

Evaluation And Findings Of The Court

[22] In order to decide an application under O. 18 r. 19(1)(a) of the ROC, it is trite that the test to be applied and considered is whether there exists a reasonable cause of action to give birth to the suit and to sustain the reliefs sought. The court is required to peruse the SOC to determine as such. In *Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996]

A 1 CLJ 393; [1996] 1 MLJ 661 at p. 409 (CLJ); p. 679 (MLJ), the Court of Appeal adopted the definition of 'cause of action' from the *Stroud's Judicial Dictionary* as follows:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the
B plaintiff must prove in order to obtain judgment (per Esher MR, *Read v. Brown* 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643).

[23] In the same case, the Court of Appeal at p. 410 (CLJ); p. 680 (MLJ) also held that the courts will also strike out 'if the action has been brought
C solely to obtain relief which the court has no power to grant, or if relief be asked on a ground which is no ground for such relief.

[24] Digesting the SOC, the plaintiff pleads that:

(a) the defendants are persons acting in concert in acquiring jointly or
D severally the fifth defendant's voting shares (para. 11 of the SOC);

(b) the defendants breached the CMSA and the Code when they failed to make a take-over offer upon assuming "control" of the fifth defendant on 27 March 2012 - (para. 12 of the SOC); and

E (c) the defendants unlawfully conspired with the intention of prejudicing the plaintiff's economic interests *via* unlawful means. Particulars of the alleged conspiracy are as per paras. 12 and 15 to 17 of the SOC.

[25] In a nutshell, the plaintiff is asking for three types of reliefs:

(a) The declaratory reliefs;

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(b) Damages; and

(c) An order to compel the first to fourth defendants to undertake a MGO.

[26] The reliefs sought by the plaintiff are indeed wide. The plaintiff is asking for a declaration that the defendants have breached a penal provision
G and he is also asking for an almost permanent injunction ie, to compel the defendants to make the MGO.

[27] To begin with, to entitle the plaintiff to the reliefs sought, he must have an existing right and the court may in its discretion grant the declaratory reliefs pursuant to s. 41 of the SRA. Declaratory orders cannot be granted
H when the strict requirement set out in the section is not satisfied. Section 41 states:

> 41. Discretion of court as to declaration of status or right
>
> Any person entitled to any legal character, or to any right as to any
I property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so

[28] The combination of s. 41 of the SRA and O. 15 r. 16 of the Rules of the High Court 1980 was discussed by Hamid Sultan JC (as His Lordship then was) in *Sabu Development Sdn Bhd v. Kelik Bayel* [2007] 9 CLJ 475; [2007] 8 MLJ 264 where His Lordship gave his learned views in this fashion:

> [9] Under s 41 of the SRA, there is a need to seek '**further relief than a mere declaration**' (emphasis added). This is not a requirement under O. 15 r. 16. **Declaratory orders cannot be granted when the strict requirement set out in this section is not satisfied**. Our courts have endorsed the criteria set out by PW Young in his book *Declaratory Orders* (2nd Ed) where he says that the criteria required before there can be a declaratory order is as follows; (a) there must exist a controversy between the parties; **(b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which usually referred to as 'standing' or '*locus standi***; (d) the controversy must be subject to the court's jurisdiction; (e) the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims; **(f) the issue must be ripe, i.e. it must not be of academic interest hypothetical or one whose resolution would be of no practical utility**. (emphasis added)

[29] Therefore and as stated earlier, s. 41 of the SRA only comes to play when the plaintiff has a right to ask for the declaratory reliefs and the plaintiff must have the *locus standi* to ask for such reliefs.

[30] Upon perusing the SOC, this court is of the considered view that the plaintiff has failed to fulfil the requisite criteria to ask for the declaratory reliefs and he has no *locus standi*. The plaintiff is asking for reliefs which he is not entitled to under the law. Sections 357(1) and 360 of the CMSA which are pleaded in the SOC do not bestow upon the court the power to grant the plaintiff the declaratory reliefs he sought for. The reasons now follow.

[31] It is plain and obvious that s. 357(1) of the CMSA, is meant for recovery of pecuniary losses. This is evident from the wordings of the section:

> 357. Civil liability of person in contravention of the security laws
>
> (1) A person who suffers **loss or damage** by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act **may recover the amount of the loss or damage by instituting civil proceedings** against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution. (emphasis added)

[32] Reading the section, this court finds that it does not confer upon the court the jurisdiction to grant declaratory reliefs sought by the plaintiff in this case.

[33] On this issue, learned counsel for the plaintiff in his oral submission begins by stating that encl. 9 is premature and an abuse of O.18 r. 19(1)(a) of the ROC. According to the plaintiff, the reliefs sought will only be properly considered and dealt with at the close of trial after evaluation of the evidence. Therefore, the plaintiff argued that he should be allowed to proceed to establish the reliefs at the trial and at this juncture, it is not proper to consider whether the reliefs ought to be granted or struck off. The case of *Tumasek Beckmann Cutlery Sdn Bhd v. Bromma (M) Sdn Bhd* [2008] 1 LNS 280; [2008] 5 MLJ 526, was cited in support of the plaintiff's submission where VT Singham J (as he then was) held at pp. 539 and 542:

> On the face of the pleadings and the reliefs claimed, this court is satisfied that the reliefs claimed are not matters which are obviously unsustainable or the claim is plainly or evidently unjust in law or a sham or has no substance for the same to be struck out or to be decided summarily.
>
> Therefore, the plaintiff should be allowed to proceed to establish the relief at the trial as this is not a proper time or an application stage to consider the final submissions where the power of the court is invoked to strike out the reliefs on the grounds, *inter alia*, that it is an abuse of process of the court.

[34] The plaintiff further refers to the Court of Appeal's decision in *Saw Seng Kee v. Nadzri & Ng Securities Sdn Bhd* [1997] 2 CLJ 425; [1996] 2 MLJ 238 where Mahadev Shankar JCA (as he then was) at p. 438 (CLJ); p. 249 (MLJ) held that:

> Order 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980 have no application if the disputed facts once established at the trial will support a cause of action. The importance of first establishing the facts before attempting short cuts has been the subject of cases under O. 33. The reasoning applies equally to applications under O. 18 and 19. The following statements should help in establishing the correct approach:
>
> (i) If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say 'You must get the facts before we decide the law.' Rather than put the parties to all that expense (and, I may add, delay), 1 think that we should have the facts ascertained in the trial court before the difficult and important point of law is decided: per Lord Denning MR in *Richards v. Naum* [1966] 3 All ER 812 at p 815.
>
> (iii) The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness

> of which remain to be tried. 1, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional: per Lord Wilberforce in the case of *Tilling v. Whiteman* [1980] AC 1 at pp 17-18.

[35] Learned counsel for the plaintiff remarked that the plaintiff ought to be given the opportunity to prove his damages at the trial and to consider the reliefs at the end of the trial. In his words, learned counsel stated that if the plaintiff is unable to prove damages for RM1 million, then this court can still gives nominal damages. Further, the plaintiff's learned counsel submitted that if all else fails, the plaintiff can rely on the omnibus relief pleaded in the SOC and that will assist his case.

[36] Order 18 r. 19(1)(a) ROC clearly confers the court with the jurisdiction to strike out statement of claim "at any stage of the proceeding". The crux of O. 18 r. 19(1)(a) is whether there is a reasonable cause of action. If there is none on the face of the SOC, the court should not be wasting precious judicial time when there will be no finding of liability in the first place. As stated in the earlier paragraph, the proposition in *Tuan Haji Ishak Ismail (supra)* states that the courts will also strike out 'if the action has been brought solely to obtain relief which the court has no power to grant, or if relief be asked on a ground which is no ground for such relief.' This principle is entrenched.

[37] In *Ideris Ondet v. Syarikat Eastern Sawmill (Sarawak) Sdn Bhd* [2002] 1 LNS 214; [2002] MLJU 309 and *Goh Joon v. Kerajaan Negeri Johor & Ors* [1999] 5 CLJ 335; [1998] 7 MLJ 621, the courts echoed the same sentiments of Shankar J (as he then was) in *Tuan Haji Ishak bin Ismail* and for the plaintiff to say the established principle does not apply to this present application is untenable. In *Ideris Ondet v Syarikat Eastern Sawmill (Sarawak) Sdn Bhd*, Richard Malanjum J (as His Lordship then was) states:

> 7. As to what is the meanings of the phrases 'cause of action' and 'plain and obvious' I can do no better than to quote his Lordship Shankar JCA in the case of *Tuan Haji Ishak bin Ismail & Ors v. Leong Hup Holdings Bhd And Other Appeals* [1996] 1 MLJ 661 when he said this at pp. 674-676:
>
> > With respect, I think we should first ask ourselves what a 'cause of action' is. 1 *Stroud's Judicial Dictionary* (5th Ed) at p. 378 gives 20 separate interpretations of this expression. I think the first is appropriate:
> >
> > > A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v. Brown* 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643).

A *There is an added dimension to O. 18 r. 19(1), in that the court will also strike out 'if the action has been brought solely to obtain relief which the court has no power to grant' (Dreyfus v. Peruvian Guano Co (1889) 41 Ch D 151), or if relief be asked on a ground which is no ground for such relief. (Johnston v. Johnston (1884) 33 WR 239 - see 1995 1 SCP para 18/19/11).* (emphasis added)

B **[38]** The case of *Tumasek Beckham Cutlery Sdn Bhd v. Bromma (M) Sdn Bhd (supra)* referred to by the plaintiff's learned counsel does not support the plaintiff's contention that this application is premature. This court finds that in that case, the learned judge did not say the reliefs need not be considered until at the end of the trial. The learned High Court Judge in that case had in fact considered the reliefs sought by the plaintiff and conclude that the reliefs claimed are not matters which are obviously unsustainable. The learned judge at para. [17] of the report states:

C

[17] On the face of the pleadings and the reliefs claimed, this court is satisfied that the reliefs claimed are not matters which are obviously unsustainable or the claim is plainly or evidently unjust in law or a sham or has no substance for the same to be struck out or to be decided summarily. Since the learned senior assistant registrar had dismissed the defendant's application to strike out the plaintiff's writ of summons and statement of claim, the plaintiff's claim under the reliefs prayed in para. 20(i), (ii) and (iii) of the statement of claim should therefore be set down for hearing however slight the chances are of succeeding (see *Saripah bte Manap & Ors v. Emar Sdn Bhd (In Dissolution) & Ors* [1998] 1 MLJ 323, *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 5 MLJ 558. *Drummond-Jackson v. British Medical Association* [1970] 1 WLR 688).

D

E

F **[39]** The facts in *Tumasek Beckham Cutlery Sdn Bhd v. Bromma (M) Sdn Bhd (supra)* are clearly distinguishable with the present case. The plaintiff's learned counsel submitted that whether a cause of action exists or whether the plaintiff is entitled to the reliefs sought are two different things. It is of the considered view that such proposition is erroneous. If reliefs and the cause of action are not to be considered, then, O. 18 r. 19(1)(a) of the ROC would be unnecessary.

G

[40] The court must look at the pleadings and the facts *ex facie* to determine whether there is a reasonable cause of action. In *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd (supra)*, the court has the affidavits before it as the application to strike out was premised on O. 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980 where different test is applicable. In that case, on examining the facts revealed in the affidavits, the court found that the case should go for trial. This court has no similar situation in the present application. There is no evidence submitted in an application under O. 18 r. 19(1)(a) of the ROC and as such there is no issue of 'disputed facts' at this stage. Therefore, the two cases referred to by the plaintiff's learned counsel do not assist the plaintiff at all.

H

I

[41] It is the plaintiff's argument further that the court has the power to grant the declaratory reliefs he sought for in this application. It is important then to look at the SOC again. Paragraphs 19.1 and 19.2 of the SOC state the reliefs prayed by the plaintiff in the following manner:

> 19.1 suatu perintah deklarasi bahawa Defendan-defendan Pertama, Ke-2, Ke-3 dan Ke-4 ialah orang yang bertindak bersama-sama (persons acting in concert) untuk mengambil kawalan (control) D5;
>
> 19.2 suatu perintah deklarasi bahawa Defendan-defendan Pertama, Ke-2, Ke-3 dan Ke-4 telah melanggari peruntukan-peruntukan dalam Akta Pasaran Modal dan Perkhidmatan 2007 dan Kod Pengambilalihan dan Percantuman Malaysia 2010 apabila Defendan-defendan Pertama, Ke-2, Ke-3 dan Ke-4 gagal untuk membuat tawaran wajib seperti yang diperuntukkan di bawah seksyen 218 (2) Akta Pasaran Modal dan Perkhidmatan 2007 dan seksyen 9(1) Kod Pengambilalihan dan Percantuman Malaysia 2010 setelah Defendan-defendan Pertama, Ke-2, Ke-3 dan Ke-4 mengambil kawalan dalam D5;

[42] Paragraphs 19.1 and 19.2 of the SOC are closely connected. Both relate to the wrongful taking over control of the fifth defendant. In his written submission in reply, learned counsel for the plaintiff states that the jurisdiction and power of the High Court to make a declaratory order does not originate from the CMSA in the first place. In fact, learned counsel argued that the jurisdiction of the High Court is independent from the CMSA. The plaintiff therefore concedes that he is not entitled to the declaratory reliefs he prayed for pursuant to ss. 357 and 360 of the CMSA.

[43] There are two causes of action pleaded by the plaintiff in his SOC ie, breach of statutory duties and unlawful conspiracy. The statutory duties that the plaintiff is relying upon are the statutory duties under the CMSA. But the plaintiff in his submission says that the court has the power to grant the declaratory reliefs independent of the CMSA. This is untenable because the court still needs to have the originating power to grant the declaratory reliefs.

[44] The plaintiff then submitted further that he has no difficulty to meet the wordings of 'legal right' under s. 41 of the SRA once he makes out the claim under the tort of unlawful conspiracy. The plaintiff submitted that besides s. 41 of the SRA, the court has the inherent power, to grant the declaratory reliefs. This court has no qualms about the inherent powers of the court. But now, the plaintiff's submission is inconsistent with the reliefs he sought for in the SOC. It is of the considered view that the tort of unlawful conspiracy does not give the power to the court to give declaratory order that the defendants contravened a penal provision of the CMSA. This court cannot entertain a declaratory relief which has no nexus to the pleadings of unlawful conspiracy. The declaratory reliefs sought for by the plaintiff are for the breach of statutory duties and in the absence of the power under the CMSA to grant those reliefs, render this court powerless to grant the reliefs. Further, the plaintiff cannot escape the fact that he does not have the right to the declaratory reliefs in the first place.

[45] The next important consideration is whether s. 357 of the CMSA is applicable in the absence of the SC's ruling. This court answers the question in the negative following the decision of the Court of Appeal in *Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587; [2016] 2 AMC 305 ('*Shahidan Shafie*') which was first followed by this court in the case of *Kuan Shin @ Kuan Nyong Hin & 3 Ors v. Ng Aik Kee & 6 Ors* [2016] 1 AMCR 701.

[46] In *Shahidan Shafie (supra)*, the Court of Appeal dealt with the issue whether s. 153 of the Securities Commission Malaysia Act 1993 ("SCA") which is in *pari materia* with s. 357 of the CMSA evokes an intention of Parliament to give a private cause of action for breach of a statutory duty. The court held:

> The common law does not recognise "breach of a statutory duty" as a private cause of action. However, by reconciling the interpretation of s. 153 with other provisions in the Act, the appellant's right to sue will only exist when the Securities Commission ("SC") had made a ruling. The SC must first make a ruling that the respondents had acquired control of Naluri and was required to make the mandatory take-over offer to the shareholders of the Naluri. The SC was aware of the allegation of the respondents having "acquired control" of Naluri and had sought clarification from the Board of Directors of Naluri. The SC took no further action after considering Naluri's clarification. The appellant however had failed to seek a review of the SC's decision in court. If the interpretation of s 153 of the Act were to be adopted, then it would amount to the court stepping into the shoes for the SC.

[47] Since s. 153 of the SCA is in *pari materia* with s. 357 of the CMSA, it is of the considered view that the same interpretation must be given to the latter. In both ss. 153 of the SCA and 357 of the CMSA, it is not expressly provided that the ruling of SC is a condition precedent to an action. The Bill adduced by the plaintiff is similar in wordings in comparison to s. 357 of the CMSA in that it also does not state that the SC's ruling is a condition precedent, the explanatory note in the Bill states:

> 147. Fasal 357 menyatakan tanggungan sivil bagi perlanggaran Bahagian VI Akta yang dicadangkan. la memperuntukkan bahawa mana mana orang yang mengalami kehilangan atau kerugian akibat daripada perlakuan seorang lain yang melanggar mana-mana peruntukan Bahagian Vi atau mana-mana peraturan-peraturan yang dibuat di bawah Akta yang dicadangkan, boleh mendapatkan kehilangan atau kerugian itu dengan memulakan prosiding sivil terhadap orang itu ...

[48] It is of the considered view that there are no difference between s. 153 of the SCA and s. 357 of the CMSA. As such, this court is bound to follow the Court of Appeal's decision in *Shahidan Shafie* as it is clear that the Court of Appeal had considered various factors in coming to its decision including the general principle that the courts will be slow to second guess the decision of the regulator.

[49] What is the actual implication of the Court of Appeal's decision in *Shahidan Shafie*? Does that mean that a ruling of the SC must first be obtained every time when one wants to take actions under the CMSA? This court is of the considered view that *Shahidan Shafie*'s case must be confined to s. 153 of the SCA which is now s. 357 of the CMSA. To extend it further would do injustice. So whether s. 360 was in the SCA before would not make any difference to the Court of Appeal's decision because s. 357 and s. 360 cater to totally different reliefs.

[50] In view thereof, as the SC has not made any ruling in this instant matter, the plaintiff cannot be allowed to come to court to pursue for the declaratory reliefs and there is no right to damages under s. 357 of the CMSA before such ruling of the SC is made.

[51] Further, this court agrees with the third defendants' learned counsel that the declaratory reliefs that the plaintiff is seeking are academic. One of the reliefs sought by the plaintiff states (*in verbatim*):

> (b) Suatu perintah deklarasi bahawa Defendan-defendan Pertama, Ke-2, Ke-3, dan Ke-4 telah melanggari peruntukan-peruntukan dalam Akta Pasaran Modal dan Perkhidmatan 2007 dan Kod Pengambilalihan Dan Percantuman Malaysia 2010 apabila Defendan-defendan Pertama, Ke-2, Ke-3 dan Ke-4 gagal untuk membuat tawaran wajib seperti yang diperuntukkan di bawah seksyen 218(2) Akta Pasaran Modal den Perkhidmatan 2007 dan seksyen 9(1) Kod Pengambilalihan dan Percantuman Malaysia 2010 setelah Defendan-defendan Pertama, Ke-2, Ke-3 dan Ke-4 mengambil kawalan dalam D5

[52] The above reliefs sought for are worded in such a manner as to declare that the defendants committed a criminal offence under the CMSA. Even if the declaratory reliefs are granted, the plaintiff cannot enforce it by a criminal proceeding. The plaintiff cannot ask this court to assert the constitutional right of the Attorney General as the Public Prosecutor in deciding for the prosecution in criminal matters. The principle that the court will not grant declaratory reliefs which are academic in nature was lucidly stated by the Court of Appeal in *Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [2006] 1 CLJ 977; [2006] 3 MLJ 207 as follows:

> [4] We were entirely in agreement with learned senior federal counsel that the appeal was indeed academic. The subject matter of the appeal was the correctness of the restrictive residence order made against the appellant and to which he had been subject. That order having come to an end, there was no longer a valid *lis* before us for adjudication. Any views we may express about the validity or otherwise of the order would be wholly academic in the circumstances of this case. It will simply have no effect at all. It will mean that we would act in vain. And it is settled law that a court will not act in vain. **Equally it is also settled that the court will not grant academic declarations**, See *Re Barnato* [1949] Ch 258. There is therefore no alternative but to dismiss this appeal. (emphasis added)

[53] Learned counsel for the third defendant highlighted to this court that a close analogy could be gleaned from the case of *Tengku Jaffar Tengku Ahmad v. Karpal Singh* [1993] 4 CLJ 183; [1993] 2 AMR 35 where in that case, the plaintiff sought a declaration that the statement or words uttered by the defendant as appeared in the Berita Harian newspaper dated 14 February 1992 are seditious which is a criminal offence. Idris bin Yusoff J (as he then was) stated:

> Again on reference to *Government of Malaysia v. Lim Kit Siang* there is the judgment of Salleh Abbas LP (as he then was) which goes as follows:
>
> > It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's power to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney-General is the guardian of public interest and as the Public Prosecutor, he, not the court, is in control of all prosecutions.
> >
> > ...
>
> In the circumstances I agree with Mr Karpal Singh that the issues which relate to the alleged criminality do not come within the purview of a civil court as otherwise the civil court might be accused into the domain of the criminal court. In the instant case, it is clear that the plaintiff has made a complaint to a wrong forum.

[54] As such, it is unacceptable that criminal law should be enforced by so means of civil proceedings through a declaration since it is the Attorney General as the Public Prosecutor who is in control of the prosecutions and not the court.

[55] The plaintiff contended that the court has the wide discretion to make declarations and prayed as such. But what is the point of a declaratory relief when one cannot enforce it *via* a criminal prosecution?. In the case of *Tengku Jaffar b Tengku Ahmad v. Karpal Singh (supra)* and *Goh Joon v. Kerajaan Negeri Johor & Ors (supra)*, the courts looked at the declarations sought and struck off the suit without having to determine the declaratory reliefs in a trial.

[56] The plaintiff has also inserted a statement of claim filed in another court into its bundle of authorities to contend that the SC has sought for similar declaratory reliefs. This court agrees with the objection taken by learned counsel for the third defendants that firstly, it is undesirable for the plaintiff to insert a statement of claim into the bundle of authorities without filing an affidavit because a statement of claim by itself has no probative value. Secondly, whether or not the SC is asking for similar declaratory reliefs are completely irrelevant because the defendants in that case have the right to strike out the reliefs pursued if it was minded too. It is also uncertain

whether that case has been disposed of and the outcome thereto. Thirdly, the SC is the regulator. If it goes on to obtain the pleaded declaration, it may pursue them in the criminal courts by getting a sanction from the Attorney General to prosecute. Therefore, this court agrees further that the declaration sought for by the SC is not in a sense academic. In view thereof, the plaintiff's submission with regard to this point is not relevant and is rejected.

[57] Moving on to the issue of damages. This court looks again at both ss. 357 and 360 of the CMSA and to understand both the sections, they have to be read and evaluated with the provisions of the CMSA in totality.

[58] By virtue of s. 217(4) of the CMSA, the SC is mandated to administer the Code. The section reproduced:

> 217. Malaysian Code on Take-Overs, Mergers and Compulsory Acquisition
>
> (1) The Minister may, on the recommendation of the Commission, prescribe a Code which shall be published in the *Gazette*
>
> (2) The Minister may, from time to time, on the recommendation of the Commission, amend any of the provisions of the Code and any amendment thereto shall be published in the *Gazette*
>
> (3) The Code shall contain principles governing take-over offer, merger or compulsory acquisition
>
> (4) The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing, may:
>
> (a) Issue rulings
>
> (i) to interpret this Division and the Code
>
> (ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and
>
> (b) enquire into any matter relating to any takeover offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

[59] The Bursa in the meantime is tasked to ensure an orderly and fair market in the securities or derivatives that are traded through its facilities pursuant to s. 11 of the CMSA.

[60] Past judicial pronouncements have established the principle that any court will not second guess the decisions of any regulators. The Court of Appeal in *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698;

[2009] 4 MLJ 695 at p. 719 in adopting the judicial statement in *R v. Securities and Futures Authority ex p Panton* (Unreported; 20 June 1994) stated as follows:

> [43] While the Bursa remains a body vested with statutory powers there are peremptory requirements that the Bursa itself has to observe and implement to sustain the required orderly and fair market in respect of securities or future contracts. Uppermost it has to act in public interest singularly for the protection of investors in the financial sectors. There is therefore here a spectrum of matters in the realm of financial implications and complexities. In effect there is a homogenised issue of a public duty and private law matters. The situation warrants a reference to the judicial statement in *R v. Securities and Futures Authority ex p Panton* (unreported; 20 June 1994) per Sir Thomas Bingham:
>
> > It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.
>
> [42] Apart from submissions premised on the sub judice rule GBA has not been able to persuade this court that the enforcements proceedings are in excess of statutory authority or so erroneous in law such that in that regard the Bursa is rendered susceptible to judicial review. In a highly fluid financial market the true nature of the reliefs sought are calculated to impose a crippling delay in derogation of the principle of timeliness and accuracy which is inept in matters of financial control.

[61] In *Shahidan Shafei (supra)*, the Court of Appeal was very minded of the same principle as well where the court states:

> 29. If we were to adopt the interpretation of section 153 SC Act of the Plaintiff, it would amount to the Court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament ...

[62] Rohana J (as Her Ladyship then was) took a similar stance in *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* [2012] 7 CLJ 407; [2012] 6 MLJ 131 where Her Ladyship had this to say at pp. 429-430 (CLJ); pp. 151 and 152 (MLJ):

> NON-INTERFERENCE BY COURT
>
> [53] *The court had shown reluctance in interfering with Bursa decision in enforcing its objective done in good faith. The principle of non-interference is premised on the basis that Bursa is a regulatory body mandated under the law to maintain and promote the interests of public members dealing on the exchange, and should be left to carry its objectives unless it acted in excess of jurisdiction.* The Court of Appeal

in *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 4 CLJ 698; [2009] 4 MLJ 695; adopted the same position. This was echoed in all the later decisions of the High Court in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Bhd* [2010] 6 CLJ 581, *Syarikat Kayu Wangi Bhd v. Bursa Malaysia Berhad* (Civil Suit No MT FLJC 13 June 2007), *Tan Sri Dato' Hj Lamin Mohd Yunus v. Bursa Malaysia Securities Bhd* [2011] 7 CLJ 215; [2012] 7 MLJ 85.

[54] Similar stance is taken in other Commonwealth jurisdiction such as United Kingdom, Australia and New Zealand. In the Australian case of the *Kwikasair Industries Ltd v. Sydney Stock Exchange Limited BC 6800002* (1968) CCH ASLC 30, the court refused to overturn the decision of exchange and Street CJ in that case observed that the stock exchange is not only entitled but duty bound to be concerned with maintaining of fair market which is predominant amongst all its objectives. His Lordship further observed in that case that, so long as it remains with its main objective the members of its committee should be left to exercise honestly their powers unencumbered by the prospect of having to face litigious investigation of correctness of their decision. In *R v. International Stock Exchange of UK and Ireland Ltd, ex parte Else Ltd* [1993] 1 QB 534, *it was observed by Lord Bingham that, 'the court will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market'. These cases demonstrate the attitude of the courts in reviewing the decision made by the exchange in different jurisdiction.* (emphasis added)

[63] The entrenched principles stated in the cases above must be followed and applied. In deciphering the will and intention of the Parliament in drafting the statutes, it must be borne in mind that it is not the court's role to second guess the regulator's decision and in this case, the SC. The Court of Appeal in *Shahidan Shafie* held that pursuant to s. 153 of the SCA, the appellant's rights to sue exist only after the SC had made a ruling. His Lordship David Wong JCA in delivering the judgment in *Shahidan Shafie* stated as follows:

28. As we have intimated earlier, in construing section 153 we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, we agree with the learned counsel for the Defendants that the Plaintiff's right to sue can only exist when the Securities Commission had made a ruling.

[64] The Court of Appeal in *Shahidan Shafie* had considered s. 153 of the SCA not in isolation but had also considered the other provisions of the SCA to discern the context of the Act. The other provisions in the SCA considered are ss. 33A(4) and (5); 33D(1) (a) - (g); 33D (2); and 33D(3). It is pertinent to note that Division 2 of Part IV of the SCA (comprising ss. 33 - 34C) is in *pari materia* with the new Division 2 of Part VI of the CMSA (comprising ss. 216 - 225).

[65] This court concludes that that is the correct approach to be taken in statutory interpretation because it is imperative for a court of law to discern the intention of the Legislature in statutory interpretation. Section 17A of the Interpretation Acts 1948 and 1967 provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[66] In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 Gopal Sri Ram JCA (as he then was) when discussing s. 17A of the Interpretation Acts 1948 and 1967, in no uncertain terms said:

> 79. In my respectful view, s 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. Hence, the governing principle is this. When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does not promote its purpose or object.

[67] The interpretation of s. 153 of the SCA by the Court of Appeal in *Shahidan Shafie* which is in *pari materia* with s. 357 of the CMSA is therefore binding on this court. The importance of the doctrine of *stare decisis* was lucidly stated in the decision of the apex court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; [2006] 2 MLJ 293 as follows:

> [3] Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy Sinnappan & Anor v. Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said (at p 582):
>
> > We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

[68] Based on the doctrine of *stare decisis* and as stated in the earlier paragraph, this court has applied the principle laid down in *Shahidan Shafie* in the case of *Kuan Shin @ Kuan Nyong Hin & 3 Ors v. Ng Aik Kee & 6 Ors (supra)* and held that the plaintiffs in that case did not have a private right to enforce the Code without making a report with the SC. In this instant case, as the plaintiff has not obtained a ruling from the SC prior to the commencement of this suit, he does not have a cause of action to ask for damages. As such, this court agrees with the submission of the third defendant's learned counsel that the plaintiff's claim for damages in reliance of s. 357 of the CMSA is premature.

[69] Section 360 of the CMSA is a general "catch-all" provision and in totality gives the court the wide powers to make the following orders:

(a) an order restraining or requiring the cessation of the contravention;

(b) an order restraining a person from dealing in securities or trading in futures contracts in respect of any class of securities or futures contracts mentioned in the order;

(c) an order declaring a futures contract to be void or voidable;

(d) an order restraining the person from acquiring, disposing of or otherwise dealing with, assets which the court is satisfied such person is reasonably likely to dispose of or otherwise deal with;

(e) an order directing a person to dispose of any securities that are specified in the order;

(f) an order restraining the exercise of any voting or other rights attached to any securities that are specified in the order;

(g) an order restraining a person from making available, offering for subscription or purchase, or issuing an invitation to subscribe for or purchase, or allotting any securities that are specified in the order;

(h) an order appointing a receiver of the property of a holder of a Capital Markets Services Licence or the property that is held by such holder for or on behalf of another person whether on trust or otherwise;

(i) an order vesting securities or such other property that is specified in the order in the Commission or a trustee appointed by the court;

(j) where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring such person to do such act or thing;

(k) in a case of a contravention by a person of the rules of a stock exchange, a futures exchange or an approved clearing house, an order giving directions concerning compliance with or enforcement of those rules to

(i) the person; and

A (ii) if the person is a body corporate, the directors of the body corporate;

(l) in a case where the person is a chief executive or director, an order removing him from office or that he be barred from becoming a chief executive, director or be involved in the management directly or
B indirectly, of any other public company for such period of time as may be determined by the court;

(m) an order requiring that person, or any other person who appears to have been knowingly involved in the contravention, to take such steps as the court may direct to remedy it or to mitigate its effect including making
C restitution to any other person aggrieved by such contravention;

(n) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act;

D (o) where a person has refused or failed or is refusing or failing to comply with any direction issued by the Commission under ss. 354, 355 or 356, an order directing such person to comply with such direction that is issued by the Commission; and

E (p) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection.

[70] Reading s. 360 in totality, again, this court finds that it does not confer upon the court with the power to grant declaratory reliefs. So, where do the plaintiff's rights come from? The declaratory reliefs the plaintiff is seeking
F are from the allegation of breach of statutory rights but unfortunately, the provisions in the statute relied upon by the plaintiff do not give him that right. Section 360 of the CMSA is not intended to confer the court with the power to grant declaratory reliefs.

[71] There is a clear distinction between ss. 357 and 360 of the CMSA.
G Section 357 CMSA relates to pecuniary losses whilst s. 360 of the same confers the court with a discretion to make variety of orders.

[72] In scrutinising s. 360 of the CMSA, the court's discretion is only exercisable when the application is made by person aggrieved by an alleged contravention by another person of a relevant requirement.

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[73] Learned counsel for the third defendant pointed out that the key word in s. 360 is 'relevant requirement' and not just 'aggrieved person'.

[74] Apparently, 'relevant requirement' is given a definition in s. 360(13)(c) of the CMSA as follows:

I (13) For the purposes of this section, "relevant requirement"

(a) in relation to an application by the Commission under this section, means a requirement:

(i) which is imposed by or under this Act or any securities laws;

(ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws;

(iii) which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house; or

(iv) which is imposed by or under any other law and the contravention of which constitutes an offence which the Commission has the power to prosecute with the consent in writing of the Public Prosecutor;

(b) in relation to an application by the exchange holding company, a stock exchange, a derivatives exchange or an approved clearing house, means a requirement which is imposed by or under the rules of the stock exchange, the derivatives exchange or approved clearing house, as the case may be; and

(c) in relation to an application by the aggrieved person, means a requirement:

(i) which is imposed by or under this Act;

(ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws;

or

(iii) which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house.

[75] Therefore, pursuant to s. 360, one becomes an aggrieved person only when there is contravention of a 'relevant requirement'. It is a technical definition of an aggrieved person, not a dictionary meaning.

[76] The plaintiff's learned counsel invited this court to interpret the words 'relevant requirement' according to the dictionary meaning. It is of the considered view that it should not be as this will tantamount to a mischief which will harm the language of the statute. In *Hooman Khanloo v. PP* [2015] 6 CLJ 1005; [2015] 5 MLJ 199, the Court of Appeal stated that it is the rule of statutory interpretation that ordinary words must be given their ordinary meaning and technical words their technical meanings. The same view can also be found in the earlier decision of the Court of Appeal in *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 which explained another important point of interpretation. The court states:

> ... on settled principles of statutory interpretation, it is clear that when an Act of Parliament employs the expression "includes" to define some other word or expression, the intention is to leave the meaning of the expression defined open-ended. **By contrast when the word "means" is**

A **employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intended to restrict the meaning of the expression defined** (emphasis added)

[77] It is of the considered view that the wording of s. 360 of the CMSA is also exhaustive and Parliament cannot be said to have intended for the B definition of 'relevant requirement' to be open-ended. Otherwise, Parliament would employ the expression "include" into the definition of "relevant requirement". As can be seen, the word used in s. 360(13)(c) of the CMSA is "means" and therefore following the erudite judgment in *Tekali Prospecting*'s case, when the word "means" is employed to define 'relevant C requirement', the rebuttable presumption of the statutory interpretation is that the Parliament intended to restrict the meaning of the expression defined.

[78] Learned counsel for the third defendant took a painful task of combing the provisions under the CMSA that expressly provides for requirements to D be complied with. The examples of such requirements in the CMSA are found as follows:

Requirement for Capital Markets Services Licence (s. 58)

Requirement for Capital Markets Services Representative's Licence E (s. 59)

Minimum financial requirements for holder of a Capital Markets Services Licence (s. 67)

Requirement for approval to establish or operate a private retirement scheme administrator (s. 139B) F

Requirement for approval, registration, authorisation or recognition (s. 212)

Requirement to register prospectus in relation to securities (s. 232)

Requirement to lodge prospectus with Registrar (s. 234) G

Requirement for trust deed and trustee (s. 258)

Requirement for trustee and deed (s. 288)

[79] The requirements found in the sections stated above can be ascertained H easily *via* an objective test and the court may exercise its discretion judiciously to make any orders under s. 360 of the CMSA.

[80] The court then finds that compliance with the Code is not a relevant requirement under the CMSA. Section 217(3) of the CMSA provides that the Code shall contain principles governing take-over offer, merger or I compulsory acquisition. The word 'requirement' does not appear in ss. 217 to 220 of the CMSA. Section 218 of the CMSA states; 'compliance with Code; guidelines, directions, practice note and rulings'. This court agrees

with the submission by learned counsel for the third defendant that this is not just an issue of semantics. The Court of Appeal decision in *Yung Ing Ing v. Hunfara Construction Sdn Bhd* [2015] 7 CLJ 438; [2015] 5 MLJ 668 is highlighted to this court where the answer was given as to what is the implication when Parliament includes a particular term in one part or section but omits it in another part or section of the same statute. The answer given by the court through the judgment of Mohd Hishamudin Yunus JCA (as he then was) is as follows:

> [30] In my judgment it is a principle of interpretation of statutes that where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion. There are the principles of construction as pointed out by *Bennion on Statutory Interpretation* (*LexisNexis* (5th Ed) at pp 1157 & 1160):
>
> > Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings.
> >
> > Every word to be given meaning On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.
> >
> > Different words to be given different meanings Similarly it is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning ...
>
> [31] Therefore, the inclusion of the word 'cheque' in limb (c) of sub-s (2) of s. 121 and the exclusion of the word 'cheque' in the latter limb of that subsection was done intentionally and purposely by Parliament; and the court must give effect to the intention of Parliament: that whilst the former limb (limb (c)) applies to cheques, the latter (subsequent) limb does not.

[81] Applying the *ratio decidendi* of the judgment in *Yung Ing Ing* since the word "requirement" is not found in ss. 217 to 220 of the CMSA, it must follow that s. 360 of the CMSA is not intended to confer on the plaintiff a right to apply to compel the defendants to undertake a MGO.

[82] Learned counsel for the third defendant brought this court to a closer study of Division 2 of Part VI of the CMSA. Division 2 of Part VI supports the above contention. The CMSA expressly states that it is the SC's duty to administer the Code (s. 217(4) of the CMSA). Division 2 of Part VI of the CMSA does not provide any right of a dissenting shareholder (like the plaintiff) to apply to the court for an order to compel the defendants to

undertake an MGO. The rights of a dissenting shareholder (like the plaintiff) are provided for under ss. 223 and 224 of the CMSA and they do not provide a private right to enforce the Code. This court agrees with the third defendant's contention that if Parliament intended for a private right to enforce the Code, then, it would have been spelt out clearly in either ss. 223 or 224 of the CMSA, or at least somewhere in Division 2 of Part VI of the CMSA.

[83] The plaintiff in his submission seeks to use the general provision in s. 360 of the CMSA to override the specific provisions contained in ss. 217 and 218. Section 220 of the CMSA clearly provides for recourse to the SC to take action in cases of non-compliance with the Code. This court is of the considered view that the only harmonious interpretation is that s. 360 of the CMSA does not apply to Division 2 of Part VI of the CMSA. If it does, then there will be an overlap between s. 220 with s. 360(1)(a) of the CMSA. It cannot be so. Then the irresistible conclusion would be that Parliament has legislated in vain. Sections 220 and 360 of the CMSA cannot be the same because if they are, either one will be superfluous. Every provision in any statutes is there for a specific purpose. The word 'requirement' is not in Part V1 because Parliament does not envisioned a third party to enforce the Code. Parliament envisioned the SC to enforce the Code.

[84] This court further agrees that an interpretation which affords the SC the right of recourse against non-compliance with the Code pursuant to s. 220 and s. 360 of the CMSA is not harmonious. Therefore, it is safe for this court to conclude that Parliament did not intend to confer a private right to compel the defendants to undertake the MGO under s. 360 of the CMSA.

[85] The court must be cautious with this kind of action as it will open the flood gate to litigation. The gate must be opened only when there is a breach of a relevant requirement. Further, if s. 360 is intended to confer on this court with the discretion to compel the defendants to undertake a MGO at the plaintiff's application, then this court is stepping into the SC's shoes and will deprive the SC of its statutory right pursuant to s. 219 of the CMSA to grant exemptions in writing to any person from the provisions of Division 2, the Code and any ruling made under s. 217(4) of the CMSA. Based on the cases alluded to earlier, the courts will not interfere nor step into the shoes of the regulator. It is superfluous for Parliament to enact s. 219 of the CMSA if the courts are entitled to take away that right accorded to the SC by virtue of s. 360 of the CMSA. As such, the third defendant's argument that there is no private right to compel the defendants to undertake a MGO is fortified.

[86] The plaintiff also claims for damages for unlawful conspiracy. Conspiracy is pleaded in paras. 15 to 18 of the SOC. The plaintiff pleads that the defendants and other unknown parties ("pihak-pihak tertentu") conspired to jeopardise the plaintiff's economic interest *via* unlawful means. The plaintiff pleaded that the defendants and other unknown parties ('pihak-pihak tertentu') unlawfully conspired to harm the plaintiff's economic interest as

in para. 15 of the SOC. Subsequently in para. 16 the plaintiff pleads that the unknown parties (pihak-pihak tertentu') committed overt acts as particularised in para. 12 of the SOC. In *verbatim*, para. 16 is reproduced:

> 16. Berikutan konspirasi yang disebut di atas, Defendan-Defendan serta pihak-pihak Tertentu telah melakukan tindakan-tindakan terbuka (overt acts) sepertimana yang diplidkan dalam perenggan 12 Pernyataan Tuntutan.

[87] In para. 12(c) of the SOC, the plaintiff states as follows:

> 12. Sebaliknya, Defendan-defendan yang diketuai oleh DI telah secara bersesama dan/atau berasingan menyebabkan:
>
> (i) Seorang individu Wong Kim Sun (WKS) untuk memperolehi 16,000,000 syer dalam D5 pada 9.5.2012;
>
> (ii) LKF untuk memperolehi 20,000,000 syer dalam D5 pada 16.10.2012; dan
>
> (iii) Isteri LKF, iaitu Teh Chai Leng untuk memperolehi 6,551,000 syer dalam D5 sepanjang tahun 2012

[88] There are no "pihak-pihak tertentu" mentioned in para. 12 but instead three people are named in para. 12(c). As a matter of fact, there is no reference to any other person other than the defendants in para. 12 and the three individuals by the name of WKS, LKF and Teh Chai Leng. This court is of the considered view that the unknown parties mentioned in para. 15 are none other than the three individuals named in para. 12(c) of the SOC. As such, this court finds that the three individuals are in law recognised as the joint tortfeasors. There are no reasons given as to why the three individuals are not named as co-defendants as the plaintiff had pleaded that there are concerted action towards the common end between the defendants and the three named individuals. Any other readings will be incongruent.

[89] In *Malbai v. Nawi* [1961] 1 LNS 59; [1962] 28 MLJ 99, Rigby J in quoting the law sets out in Clerk and Lindsell's textbook on the *Law of Torts*, 10th edn, p. 263 highlighted the general rule that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all, if it is proven that there is a concerted action towards the common end. As such, this court is unable to see how a charge of collusion or conspiracy in a suit can be initiated when not all tortfeasors are charged or sued in the same case. The position is such that when the plaintiff chooses not to sue, he does that at his own peril. What if the other tortfeasors are sued some other time in some other courts? This court agrees with the answer given by learned counsel for the third defendant; the court will then become a debt collecting agency. The plaintiff is not able to sustain the allegation of conspiracy as the entire substratum of his claim is affected by his failure to make the three individuals as co-defendants.

[90] In *Dato Abdullah Ahmad & Ors v. Bank Bumiputra Malaysia Berhad* [2001] 1 LNS 352; [2001] MLJU 638, two suits were consolidated *via* a court order. There were two groups with several individuals in the said groups. The issue of release of a joint tortfeasor was raised and the relevant portion of the decision is as follows:

> I would think the same goes for their claim that BBMB colluded with the Ahmad Azizuddin group and acted with an intention to cheat so as to deprive the Abdullah group of the benefit of the said shares. I cannot see how a charge of collusion in a suit can stand when one of the two persons who are parties to the alleged understanding or conspiracy is no longer a party to the suit. According to *Osborn's Concise Law Dictionary* (7th ed.), the word "collusion" means "the arrangement of two persons, apparently in a hostile position or having conflicting interests, to do some act in order to injure a third person or deceive a court." The *Concise Oxford Dictionary* (9th Ed) states the word "collusion" means "1. a secret understanding, esp. for a fraudulent purpose. 2. Law such an understanding between ostensible opponents in a lawsuit" and the word "collude" means "come to an understanding or conspire together, esp.for a fraudulent purpose". The *Concise Oxford Dictionary* states the word "conspire" means "combine secretly to plan and prepare an unlawful or harmful act". The meaning of the word "cheat" in the *Concise Oxford Dictionary* is "1.a. deceive of. b. deprive of. 2. gain unfair advantage by deception or breaking rules, esp. in a game or examination.
>
> Since BBMB has now ceased to be party, I would think that the charge of collusion and acting with an intention to cheat against BBMB and the Ahmad Azizuddin group can no longer be pursued by the Abdullah group. For the charge of collusion and acting with an intention to cheat, the Abdullah group would have to prove that there was an arrangement between BBMB and the Ahmad Azizuddin group to plan and prepare an unlawful or harmful act, namely:
>
> (i) that BBMB will secretly sell and the Ahmad Azizuddin group will secretly buy the said shares;
>
> (ii) that BBMB and the Ahmad Azizuddin group are hostile towards the Abdullah group; and
>
> (iii) that BBMB and the Ahmad Azizuddin group have conspired to injure the Abdullah group by depriving the same of the said shares and that they have done so with an intention to cheat.
>
> With BBMB now no longer a party, I cannot see how the charge of collusion can now remain an issue. It is my view that the substratum of the claim by the Abdullah group against BBMB and the Ahmad Azizuddin group evaporated the moment BBMB ceased to be a party to these proceedings.

[91] The third defendant submitted that whilst it is acknowledged that in *Dato Abdullah Ahmad*'s case, BBMB ceased to be a party in the suit thereby causing the High Court to dismiss the allegation of conspiracy, there is no tangible difference in this case where the plaintiff has released the three

individuals named in para. 12 of the SOC as proposed defendants from this suit. Learned counsel for the third defendant argued that the net result is the same and this court agrees.

[92] This court moves on to discuss the *Mak Siew Wei*'s decision. With the greatest respect and in all fairness to the learned JC, from the reported judgment of the case, this court finds that the defendant in that case did not offer the same argument before this court. The learned JC was not appraised with the crust of the third defendant's arguments herein.

[93] The contentions in *Mak Siew Wei'*s case can be found at para. [6] of the report and they are as follow:

> [6] The primary contentions of the seven defendants as contained in the written submissions for ends 15, 16 and 17 filed by the first and second defendants, the fourth to seventh defendants, and the third defendant, respectively, are substantially similar. The main argument advanced by the defendants is that the plaintiff's claim is premature and discloses no reasonable cause of action because the alleged violation of the CMSA or the Code does not give rise to a private cause of action under s. 357 of the CMSA in the absence of a ruling by the Securities Commission ("the SC") on the said breach. Thus the plaintiff does not have the requisite *locus standi* to make the claim, and the tort of unlawful means conspiracy, which is premised on the same alleged breach is equally unsustainable, justifying the striking out of the claim made by the plaintiff.

[94] There is a need to understand the situation before the learned JC. At para. 11 of the report, it could be seen that the defendants in that case came before the learned JC and submitted that the plaintiff has no cause of action based only on *Shahidan Shafei*'s case. Paragraph 11 is reproduced:

> [11] *The plaintiff, in response, did not appear to have any answer to the submissions by the defendants on the absence of the private cause of action under s. 357 in view of Shahidan Shafie, other than making the point that he is also entitled to commence the action against the seven defendants for the said contravention based on s 360 of the CMSA, which permits any person aggrieved by an alleged breach of a relevant requirement to apply to the High Court for various remedies specified therein.* The plaintiff also argued that in respect of the claim on tort of conspiracy, the House of Lords had ruled in *Customs and Excise Commissioners v. Total Network SL* [2008] 1 AC 1174 that criminal conduct can constitute unlawful means in an unlawful means conspiracy and the claim is thus sufficiently actionable (emphasis added)

[95] Paragraph 11 of the report reflects that the learned JC was fully aware of *Shahidan Shafei*'s case and the plaintiff's counsel appearing before the learned JC did not have the answer when he was asked as to the absence of the private cause of action under s. 357 in view of the same case. Instead, the plaintiff's counsel went straight to make the point that he is also entitled to commence the action against the defendants under s. 360 of the CMSA. That was what the plaintiff's counsel did in *Mak Siew Wei*. Appreciating the

A factual matrix and substratum of that case, and again, with the greatest respect to the learned JC, this court takes a different view from the said decision. The reasons now follow.

[96] Similar reliefs as in this case were sought by the plaintiff in that case ie, declaration, damages and injunction. This can be seen at para. 2 of the B report and reproduced:

> [2] This writ action by the plaintiff essentially seeks primarily a declaration that the seven defendants were acting in concert to obtain control of the eighth defendant company, that they had contravened s. 218(2) of the Capital Markets and Services Act 2007 ("the CMSA") and s. 9(1) of the C Malaysian Code on Take-overs and Mergers 2010 ("the Code') for their failure to undertake a mandatory offer for the shares in the eighth defendant company, and that as such they be ordered to make a mandatory general offer to ensure compliance with the said provisions and pay damages to the plaintiff for the losses allegedly suffered as a result of the breach.

D

[97] Nevertheless, there was no consideration of s. 41 of the SRA, the 'relevant requirement' under s. 360 of the CMSA and the different components of the reliefs sought that were brought to the attention of the learned JC. All the learned JC was required or invited to determine was E whether there exists a cause of action. In *Shahidan Shafie*, the Court of Appeal said, if one were to seek for damages under s. 153 of the SCA, the ruling of the SC must be obtained. The learned JC himself concluded that there may be a problem if one does not obtain such prior ruling from the SC and this can be found in para. 26 of the report. The learned JC states:

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> [26] It is only if the SC decides to invoke s. 358 to recover on behalf of those aggrieved by way of civil proceedings that the outcome of the private claim under s. 357 may be affected because in both situations, recovery is from the same person alleged to have been in breach, whereby in a civil action instituted by the SC, the requirement under s. 358 is for the costs incurred by the SC to be first reimbursed from the amount so G recovered.

[98] This court then asked, if there is no ruling by the SC, how would the plaintiff know that the SC will not take any action?

[99] The learned JC then proceeded to conclude at para. 13 of the report as follows:

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> [13] Based on my review of the relevant provisions of the CMSA (counsel for parties did not highlight many of the points I discuss below), I conclude that s. 357 of the CMSA grants any person who claims to have suffered loss as a result of a breach by another in not complying with the mandatory general offer requirements, the right to recover by instituting I civil proceedings against the person in breach, without the need for the SC to first make a ruling on whether certain parties have been acting in concert to obtain control, or that there was a breach as a result.

[100] The conclusion in the above came after the learned JC considered two factors:

(i) the Court of Appeal in *Shahidan Shafie* had interpreted s. 153 of the SCA (which is in *pari materia* to s. 357 of the CMSA) - para. 15 of the reported judgment; and

(ii) the take-over provisions found in Division 2 of Part IV of the SCA is now found in Division 2 of Part VI of the CMSA - para. 16 of the reported judgment.

[101] It is crystal clear that from the judgment of the learned JC, the interpretation given is that s. 360 of the CMSA gives an entirely new flavour to the CMSA. The learned JC distinguished the facts before him and in *Shahidan Shafie* by emphasising that the Court of Appeal did not consider s. 360 of the CMSA. This can be seen from para. 22 of the report:

> [22] These enforcement mechanisms can be initiated and pursued by either the SC (ie, ss. 218, 220, 358 and 360) or the persons aggrieved by the breach (ss. 357 and 360). These other provisions were not considered in *Shahidan Shafie*. It is, in my view, thus quite plain and obvious that a person who claims to be aggrieved by a breach of s. 218 (on the failure by the person in breach extending a mandatory general offer) can resort to ss. 357 and 360 of the CMSA to vindicate his rights. I am further of the view that the words of these two statutory provisions are clear and if literally read, which should indeed be the case given the trite rule of statutory construction, provide for the claimant to institute a civil suit to enforce his right for recovery under s. 357 and pray for other specified reliefs under s. 360 accordingly. And crucially for present purposes, this can be done without the involvement of the SC because first, it is not mentioned in these sections or any other parts of the CMSA that any form of determination by the SC such as in the nature of a ruling is a prerequisite and secondly, ss. 358 and 360(1)(a) and (b) separately confer on the SC precisely substantially the same statutory right to pursue civil proceedings against the person in default, as those embodied in ss. 357 and 360(1)(d) *vis-a-vis* any person aggrieved by the breach.

[102] Since ss. 357 and 360 are found to be different, this court is of the considered view that whether or not the Court of Appeal in *Shahidan Shafie* considered s. 360 is irrelevant. Firstly, whilst the Court of Appeal did not consider s. 360 because it was not in the SCA then, but s. 100 was in the Securities Industry Act 1983 ('SIA'). The court cannot assume that the Court of Appeal was not aware of s. 100 of the SIA as that was the existing law then.

[103] Secondly, the natural outcome of the decision in *Shahidan Shafie* is that the plaintiff needs a prior SC's ruling before claiming for pecuniary loss.

[104] The learned JC touched at length about the policy of the SC in introducing the new Bill of the CMSA. As stated earlier, this court is of the considered view that the policy is of no relevance as they are general in nature in stating that they want more activism from the public. This court is of the further view that the SC's general statement cannot be taken to mean that the SC is encouraging people to enforce the Code. The policy did not say that a third party can take action for the enforcement of the Code. The learned JC by way of literal interpretation is of the view that s. 357 does not state that the SC's ruling must first be obtained and to impose this condition would cause unnecessary impediment. As alluded to earlier, s. 153 of the SCA likewise, does not state that the prior ruling of the SC is required and as s. 357 of the CMSA is *pari materia* with s. 153 of the SCA, they must be interpreted in the same way as the Court of Appeal was interpreting similar language. The Court of Appeal states that under s. 153 of the SCA one has a right but that right is a qualified right and is only triggered when SC made its ruling.

[105] The learned JC then conceded that the SC has the similar power under s. 360(1)(a) of the CMSA and has obtained various orders. In para. 38, he states:

> [38] the SC too has a similar right under s. 360(1)(a), as does the stock exchange under s. 360(1)(c). Both have successfully invoked the provisions of s. 360(1) and obtained various orders, as reported in the Federal Court case of *Suruhanjaya Sekuriti v Datuk Ishak b Ismail* [2016] 2 AMR 235; [2016] 3 CLJ 19 and in the Court of Appeal case of *Tengku Dato' Kamal lbni Sultan Sir Abu Bakar & 3 Ors v. Bursa Malaysia Securities Bhd* [2013] 1 AMCR 213; [2012] 8 CLJ 678, respectively

[106] The learned JC referred to the Federal Court case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 2 AMR 235; and the Court of Appeal case of *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* [2012] 8 CLJ 678; [2013] 1 AMCR 213.

[107] Indeed, the SC has used the powers under s. 360(1) of the CMSA. But, in both cases the SC as the regulator was not enforcing the Code. In *Suruhanjaya Sekuriti v. Datuk Ishak Ismail (supra)*, the court granted an *ex parte* interim order pursuant to s. 360 of the CMSA restraining the respondent from dissipating or dealing with funds believed to be proceeds of offences committed by the respondent under the securities law. Whilst in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 3 Ors v. Bursa Malaysia Securities Bhd (supra)* the respondent successfully applied under s. 360(1)(c) of the CMSA for orders to enforce penalties for breaching the listing requirement. Therefore, the two cases cited by the learned JC in *Mak Siew Wei* are distinguishable with this instant case.

[108] In the penultimate, the Court of Appeal in *Shahidan Shafie* remains good law and as such, the plaintiff's claim for damages herein is premature without the prior ruling by the SC.

[109] The 'relevant requirement' test under s. 360 of the CMSA was not in considered and on the contrary the learned JC gave a dictionary meaning to the category of aggrieved persons under the same provision. There was also no consideration as to the word 'requirement' being absent from Division 2 of Part VI of the CMSA. The implication of the Court of Appeal decision in *Yung Ing Ing*'s case was also not brought to the High Court's attention and the learned JC was not given the opportunity to consider the lengthy submission on Division 2 of Part VI of the CMSA which is afforded to this court in this case.

Conclusion

[110] In view of the reasons alluded to in the above, it is the judgment of this court that the plaintiff is not entitled to the declaratory reliefs as he is not entitled to them under ss. 357 and 360 of the CMSA and the reliefs sought are academic. The plaintiff is also not entitled to damages as s. 357 of the CMSA is only actionable after the ruling by the SC. The release of the joint tortfeasors means the entire claim against the defendants is also not sustainable. Enclosure 9 was therefore allowed with costs of RM5,000 to the third defendant.

[111] Before departing, in the midst of writing this grounds, the first, second and fourth defendants pursued to file similar applications (encls. 21, 22 and 23). In summary, the first, second and fourth defendants contended that since the plaintiff's application herein has been struck out on 11 November 2016 against the third defendant, the plaintiff's claim pleaded in the SOC is no longer sustainable against them as their collective shareholding is less than the statutory minimum of 33% required under ss. 216(1), 218(2) of the CMSA. In addition thereto, the same arguments in this present application were forwarded. Premised on the same findings in this instant matter, on 18 January 2017, this court allowed the said applications in encls. 21, 22 and 23 with costs of RM3,000 to each of the said defendants.